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No. 86-546

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

System Energy Resources, Inc. ("SERI") formerly Middle South Energy, Inc., respectfully moves this Court for leave to file the accompanying brief in this case as *Amicus Curiae*. Pursuant to Rule 36.1 of the Revised Rules of the Supreme Court, SERI requested consent of all parties for the filing of this brief. Although Petitioner consented, Respondents have refused to do so.

SERI, the principal owner of Grand Gulf Nuclear Electric Station Unit No. 1 ("Grand Gulf 1") and the wholesaler of power therefrom, has a direct interest in Opinion No. 234 of the Federal Energy Regulatory Commission ("FERC"), the effect of which is at issue in the case *sub judice*. The FERC-approved rates filed in accordance with Opinion No. 234 are for the purpose of

allowing SERI to recover the costs it incurred in constructing and operating Grand Gulf 1, as well as SERI's FERC-established fair rate of return. SERI therefore has an interest in ensuring that Opinion No. 234 and the obligations derived therefrom are respected by local regulators.

Further, SERI is a plaintiff in a suit pending in the United States District Court for the Eastern District of Louisiana encaptioned: "Middle South Energy, Inc., et al. v. The Council of the City of New Orleans, et al.", Civil Action No. 85-5273 D, in which one of the questions involved is similar to that presented in the instant case: the propriety of federal court abstention in the context of exclusive federal jurisdiction and substantial federal preemption claims.

The brief of New Orleans Public Service Inc., petitioner herein, does not adequately emphasize the importance of this decision to other jurisdictions, particularly those served by SERI. Petitioner's brief also does not discuss the exclusive jurisdictional grant provided in 16 U.S.C. § 825p and its relation to the questions presented for decision in the instant case. If Applicant's argument is approved by this Court, the decision of the court below must be reversed.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST

System Energy Resources, Inc. ("SERI"), formerly Middle South Energy, Inc. ("MSE"), is the owner of a ninety percent (90%) undivided interest in the Grand Gulf Nuclear Electric Station Unit No. 1 ("Grand Gulf 1"). Grand Gulf 1 provides electricity for customers served by the Middle South System in the States of Louisiana, Mississippi, Arkansas and Missouri. The Middle South System is a highly integrated, coordinated electric public utility holding company system, consisting in part of four operating companies [1] and SERI.

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[1] The operating companies of the Middle South System are New Orleans Public Service Inc. ("NOPSI"), Arkansas Power & Light Company ("AP&L"), Louisiana Power & Light Company ("LP&L"), and Mississippi Power & Light Company ("MP&L") (collectively referred to as the "Operating Companies").

On June 13, 1985, the Federal Energy Regulatory Commission ("FERC") issued its "Opinion and Order Setting Just, Reasonable, and Non-discriminatory Rates" for Grand Gulf 1. *Middle South Energy, Inc.*, 31 FERC (CCH) ¶ 61,305 (June 13, 1985) ("Opinion No. 234"), *appeal pending*, No. 85-1611 (D.C. Cir. argued March 24, 1986). In Opinion No. 234, the FERC determined that the costs, capacity and energy of Grand Gulf 1 should be allocated among the Operating Companies in order to equalize nuclear unit investment costs throughout the Middle South System. Pursuant to this determination, the FERC allocated to NOPSI 17% of SERI's share of the costs, capacity and energy of Grand Gulf 1. This allocation translates into an annual cost to NOPSI of approximately $179 million (approximately $15 million per month) which it must pay to SERI.

Because of the dollar significance of the FERC-allocated costs, the Council of the City of New Orleans ("Council") has employed every means available to it to avoid and delay granting retail rates sufficient to cover such costs. Proceedings before the Council were initiated in advance of the then anticipated FERC decision, when, on May 17, 1985, NOPSI filed an application for approval of an increase in rates to coincide with the in-service date of Grand Gulf 1 (July 1, 1985). Notwithstanding several months of procedural posturing, the Council failed to grant NOPSI any rate relief whatsoever until September 5, 1985, when it permitted a "freeze" of NOPSI's fuel adjustment clause. The freeze only allowed NOPSI to retain cash savings in the estimated average amount of $2.83 million per month over a ten-month period, which amount resulted from the expected lower fuel costs associated with Grand Gulf 1.

As a further means of avoidance and delay, on October 17, 1985, the Council instituted an "investigation into the

prudence of NOPSI's actions with regard to its Grand Gulf 1 purchase." Council Resolution R-85-636. The express purpose of this alleged prudence investigation is to determine "what portion, if any, of NOPSI's Grand Gulf 1 expense shall be assumed by its shareholders. . . ." *Id.*[2]

Largely as a consequence of the Fifth Circuit's original ruling in this case,[3] the Council, on March 20, 1986, for the first time permitted NOPSI partially to recover through retail rates some of the FERC-allocated costs. Council Resolution R-86-112 (sometimes referred to as the "Settlement Resolution"). In return for NOPSI's agreement to absorb $51 million of Grand Gulf 1 related

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[2] Any suggestion that the case is not ripe is refuted by this Court's statement in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, —— U.S. ——, 106 S.Ct. 2718, 2722, n.1 (1986):

> We think that any ripeness challenge to respondents' complaint is foreclosed by *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), and *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975). *Steffel* held that a reasonable threat of prosecution for conduct allegedly protected by the Constitution gives rise to a sufficiently ripe controversy. 415 U.S., at 458-460, 94 S.Ct. at 1215-1216. If a reasonable threat of prosecution creates a ripe controversy, we fail to see how the actual filing of the administrative action threatening sanctions in this case does not. It is true that the administrative body may rule completely or partically in respondent's favor; but it was equally true that the plaintiffs in *Steffel* and *Doran* may have prevailed had they in fact been prosecuted.

In the present case, the Council has initiated an "administrative action threatening sanctions" which violates federal law. Under this Court's holdings in *Steffel*, *Doran* and *Ohio Civil Rights*, NOPSI does not have to wait until the Council has actually taken further action before the case is ripe for adjudication.

[3] *New Orleans Public Service Inc. v. City of New Orleans*, 782 F.2d 1236 (5th Cir. Feb. 14, 1986).

costs,[4] the Council granted rate relief which would allow NOPSI to recover the remainder of its Grand Gulf 1 related costs phased-in over a period of years. Significantly, however, the Council expressly reserved its rights to pursue its prudence inquiry and to issue orders with respect thereto.[5] Most recently, the Council ordered NOPSI to participate in hearings conducted as a continuation of the prudence investigation for the purpose of determining how much of the FERC-allocated costs NOPSI can "afford" to absorb if the Council finds that NOPSI was "imprudent." Thus, the Council interprets the Settlement Resolution to allow it to order NOPSI to absorb an additional portion of the FERC-allocated costs in excess of the $51 million already extracted.[6] Clearly, the Council has steadfastly refused to recognize that the costs allocated by the FERC must be treated as an actual operating expense for ratemaking purposes. As a result, NOPSI's ability to make the required payments to SERI continues to be jeopardized.

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[4] In connection with the Settlement Resolution, NOPSI agreed to and did withdraw its pending application for any rate increase other than for the recovery of the expenses incurred as a result of FERC Opinion No. 234. Therefore, this matter deals solely and entirely with the right of NOPSI to recover expenses it incurs as a direct result of the FERC order.

[5] The Council also reserved its "rights" to pursue other avenues designed to insulate ratepayers from paying the FERC-allocated costs of Grand Gulf 1, including (1) an alleged option to purchase NOPSI's "assets" without assuming NOPSI's Grand Gulf rights and obligations; and (2) the abrogation of the Grand Gulf agreements.

[6] In the course of these proceedings, the Council has submitted testimony of its own witnesses who advocate that NOPSI can and should be forced to absorb at least $150 million of Grand Gulf 1 costs in addition to the $51 million discussed above. The Attorney General of Louisiana and Citizens for Safe Energy advocated in these proceedings that NOPSI should be forced into bankruptcy if imprudence is found rather than allowed to recover rates sufficient to pay its share of the FERC-allocated costs.

The failure of NOPSI to remit payments timely could cause SERI to default under various financial agreements between SERI and third parties, including loan agreements with American and foreign financial institutions. This default could lead to the acceleration of debt totaling approximately $2.7 billion. Thus, NOPSI's inability to pay ultimately would place the continuing viability of the entire Middle South System in jeopardy.

In sum, this case raises a problem of extraordinarily serious proportions that threatens the stability of electric supply in Louisiana, Mississippi, Arkansas and Missouri, the jobs of thousands of people, electric service to almost two million customers, and billions of investment dollars. It is a problem involving a substantial federal question that is controlled exclusively by federal law, whose applicability does not depend on any disputed facts or issues of state law. It is therefore a case calling for the immediate exercise of federal judicial authority. SERI has an interest in ensuring that its customers, the Operating Companies, will have a federal forum in which to enforce their federal right to recover the costs allocated by the FERC.

ARGUMENT: REASONS FOR GRANTING THE WRIT

A. The Decision Below Violates This Court's Holding In *Nantahala Power & Light Co. v. Thornburg*

In this case, NOPSI seeks an injunction designed to prevent the Council from impermissibly "trapping" the FERC-allocated costs, that is, an injunction precluding the Council from denying NOPSI the right to recover its wholesale power costs incurred under a FERC-approved rate. The basis of NOPSI's claim is federal law: the filed-rate doctrine (most recently construed by this Court in *Nantahala Power & Light Co. v. Thornburg*, —— U.S. ——, 106 S.Ct. 2349 (1986)) and the Federal Power Act, 16 U.S.C. §§ 791 *et seq.*, particularly 16 U.S.C. § 825p.

This Court's decision in *Nantahala* established that a local regulatory body cannot thwart a FERC allocation of costs by "trapping" or otherwise. The question presented here is whether a federal court may avoid enforcing *Nantahala* through abstention. Because NOPSI nowhere challenges the Council's jurisdiction to determine whether there may be cost savings in other areas which may offset the FERC-allocated costs, the relief sought by NOPSI does not involve any legitimate state interest.

Nantahala establishes that the challenged actions of the Council are preempted. In *Nantahala*, the FERC fixed a just and reasonable allocation of "entitlement power" that was jointly available to two affiliated utilities (Nantahala Power & Light Co. and Tapoco, Inc.). The North Carolina Utilities Commission ("NCUC"), however, ordered Nantahala to charge a retail rate reflecting an allocation of relatively low-cost "entitlement power" different from the FERC's allocation. The effect of the NCUC order was to overstate in local retail rates the actual amount of "entitlement power" received by Nantahala and, as a result, to understate Nantahala's total actual expense for the purchase of wholesale power. The retail under-recovery was due to the relatively high cost of Nantahala's supplemental "purchase power" supply. In striking down the NCUC's hypothetical allocation of "entitlement power" for retail ratemaking purposes, this Court stated that the "NCUC cannot substitute its own conception of what allocation of entitlement power would have been . . . fair." —— U.S. at ——, 106 S.Ct. at 2358. Thus, this Court held that the NCUC's order both interfered with, and was preempted by, the Federal Power Act. —— U.S. at ——, 106 S.Ct. at 2351. The Court found impermissible the forced under-recovery, or "trapping", by the NCUC of Nantahala's wholesale power costs. —— U.S. at ——, 106 S.Ct. at 2359, 2360.

The Court squarely addressed the situation of a "middleman" who must pay a FERC-filed wholesale rate and

then seek retail rate recovery from the retail consumers who are ultimately supplied the FERC-allocated power:

> In that situation, for a state ratemaking agency to disregard a FERC-filed rate would clearly be inconsistent with the exclusive federal regulatory scheme over interstate wholesale power prices. The FERC-approved rate at which the middleman purchased power would not be fully recognized as a cost in the retail market, thereby forcing the middleman to sell power at less than its reasonable cost as determined by the federal agency.

—— U.S. at ——, 106 S.Ct. at 2358. This Court further stated:

> When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. . . . *Such a "trapping" of costs is prohibited.*

—— U.S. at ——, 106 S.Ct. at 2359 (citations omitted, emphasis added).[7]

This is precisely the situation in which NOPSI finds itself. On the one hand, the FERC has ordered NOPSI to pay SERI for Grand Gulf 1 power on the basis of a 17% cost allocation. On the other hand, the Council continues to assert that it can disallow, for purposes of retail rate-making, a portion of the expense which NOPSI incurs as a result of the FERC allocation. As a result, a portion of the wholesale costs that NOPSI is required by the FERC to pay may be impermissibly "trapped" by the

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[7] In reaching this result, this Court embraced the *Narragansett* line of cases and held that the underlying rationale of *Narragansett* is the prevention of local authorities from trapping FERC-allocated costs. The Court rejected the view that *Narragansett* permitted a state authority discretion to determine whether FERC-ordered costs were reasonably incurred where, as in *Nantahala* and here, the FERC has in fact made a just and reasonable allocation of the power under the Federal Power Act.

Council. *Nantahala* clearly establishes that the ability of the Council to "trap" those wholesale costs is preempted by the Federal Power Act.

In *Nantahala*, this Court assumed, without deciding, that local retail authorities could find in certain circumstances that the *quantity* of a given wholesale power purchase may be excessive. —— U.S. at ——, 106 S.Ct. at 2360. However, this Court made clear that such an opportunity for local action does not exist where the FERC allocates the *quantity* in question. —— U.S. at ——, 106 S.Ct. at 2360. In the present case, as in *Nantahala*, the FERC allocated the *quantity* of wholesale power. For the Council to assert, as the NCUC asserted in *Nantahala*, that the utility "had purchased an unreasonably large quantity of high cost power . . . conflicts with FERC's orders in the same manner as would a refusal to recognize a FERC-approved price as a reasonable cost for purposes of retail ratemaking." —— U.S. at ——, 106 S.Ct. at 2360.

As explained in *Nantahala*, the interplay between the federal scheme of wholesale electric power regulation and local policy is decidedly weighted in favor of "the preemptive force of FERC's decision." —— U.S. at ——, 106 S.Ct. at 2358. The strength of the FERC's "preemptive force" is so great that:

> [O]ur decisions have squarely rejected the view . . . that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary. . . .

—— U.S. at ——, 106 S.Ct. at 2356-57 (quoting *FPC v. Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964)).

B. Abstention Is Inappropriate

The Fifth Circuit's reliance on *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), is misplaced as the present case is significantly different from the situation involved in *Burford.* In *Burford,* federal jurisdiction was based upon diversity of citizenship and an alleged denial of due process of law. No claim of federal preemption was made. The plaintiff in *Burford* simply sought a review of the reasonableness under Texas state law of a Texas commission's permit to drill oil wells. This Court ruled that federal review of the reasonableness of the order would have an impermissibly disruptive effect on pervasive state policy for the management of local oil fields. The Court stated:

> The state provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts . . . . Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand.

319 U.S. at 333-34. In *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 815 n.21 (1976), this Court noted that the presence of a federal basis for jurisdiction "may raise the level of justification needed for abstention."

Precedent is well-established that *Burford* abstention is inappropriate where a federal plaintiff asserts a preemption claim. *Kentucky West Virginia Gas Co. Pennsylvania Public Utility Commission,* 791 F.2d 1111 (3d Cir. 1986); *Middle South Energy, Inc. v. Arkansas Public Service Commission,* 772 F.2d 404, 417 (8th Cir. 1985), *cert. denied,* 106 S.Ct. 884 (1986); *Baggett v. Depart-*

ment of Professional Regulation, 717 F.2d 521, 524 (11th Cir. 1983); *International Brotherhood of Electrical Workers v. Public Service Commission*, 614 F.2d 205, 212 n.1 (9th Cir. 1980).

As stated in *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission*, 791 F.2d at 1116:

> The rationale underlying these decisions is simple and straightforward: "[t]he purpose of *Burford* abstention is to avoid federal intrusion into matters of local concern and which are within the special competence of local courts," whereas "supremacy clause claims are 'essentially one[s] of federal policy,' so that 'the federal courts are particularly appropriate bodies for the application of preemption principles.'" . . . In short, then, *where "Congress has created a statutory scheme . . . which arguably preempts the local regulation complained of, a fundamental element of Burford abstention is thrown into doubt*, for we must question whether the case indeed involves an essentially local issue." (Citations omitted, emphasis added).

To argue that abstention is proper where the preemption claim involves state or local action which interferes with the enforcement of a comprehensive scheme of exclusive federal regulation perverts the very premise of abstention—avoiding needless federal intervention into important matters within a state's jurisdiction to regulate. In this case, NOPSI does not challenge the Council's jurisdiction to determine whether there may be cost savings in other areas which may offset the FERC-allocated costs. Therefore, this case does not present a federal intervention into matters over which the Council has jurisdiction.

Abstention deprives litigants such as NOPSI of a federal forum in which to enforce federal rights. Indeed, if the decision of the court below is upheld, it will preclude any federal court challenge to state authority based

on federal preemption resulting from claims arising out of the provisions of the Federal Power Act, other than by appeal or petition to this Court.[8]

In sum, the implementation, enforcement and effect of FERC Opinion No. 234, and the duty imposed thereby on respondents to recognize the FERC-allocated costs as a legitimate operating expense in accordance with the filled-rate doctrine, relate solely to federal supremacy. This Court recently reaffirmed this in *Nantahala*. As such, this matter is proper for federal court adjudication.[9]

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[8] If the lower court's decision is allowed to stand, it can be expected that an ever-increasing number of cases will be brought directly from the state courts to this Court, which will become the sole federal forum for the vindication of a public utility's federal rights. The rising costs of electrical power and the cost overruns in the nuclear power industry have spawned considerable litigation. "Trapping" issues were considered in *Nantahala* and are presented again for review by this Court in *Commonwealth Electric Co. v. Dept. of Public Utilities, petition for cert. filed*, 55 U.S.L.W. 3156 (U.S. July 17, 1986) (No. 86-61).

[9] Even should this Court find that a *per se* prohibition against *Burford* abstention is not warranted, in the context of federal preemption claims under the Federal Power Act, the lower court's reliance on *Burford* under the facts of this case was improper. "Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976). Furthermore, a federal court should not dismiss a suit merely because a state court may entertain it (*Id.* at 814 (citations omitted)), or because resolution of the federal issue may upset state policy. *Zablocki v. Redhail*, 434 U.S. 374, 379 n.5 (1978).

Under *Burford*, abstention may be proper where the "exercise of federal review of the [state law] question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River*, 424 U.S. at 814. A court invoking *Burford* abstention "essentially defers to a state's overriding interest in the matters *sub judice* and, concomitantly, *to the superior competence of the state's courts to adjudicate such matters.*" *BT Investment Managers, Inc. v. Lewis*, 559 F.2d 950, 955 (5th Cir. 1977) (emphasis added). Neither of these principles is applicable. The

The opinion below also holds that abstention is proper under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). The Fifth Circuit's decision in this matter places it in conflict with decisions of the Eighth, Ninth and Eleventh Circuits. In *Middle South Energy v. Arkansas Public Service Commission*, 772 F.2d 404, 417 (817 Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 884 (1986), the Eighth Circuit refused to apply *Younger* abstention in another case involving Grand Gulf 1 in which federal preemption claims were presented:

> Similarly, the rule of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), limiting injunctions of pending state proceedings embodies the principle of our federal system that legitimate state functions be respected. This "comity," however, is not strained when a federal court cuts off state proceedings that entrench upon the federal domain. *Baggett*, 717 F.2d at 524. The legitimate state interest contemplated by *Younger*, *see Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 74 L.Ed.2d 116 (1982), does not exist when the state action has been preempted or foreclosed by the Constitution. *Champion International Corp. v. Brown*, 731 F.2d 1406, 1408 (9th Cir. 1984) (footnote omitted).

In *Champion International Corp. v. Brown*, 731 F.2d 1406 (9th Cir. 1984), the Ninth Circuit reversed and remanded a case because it found that the district court had abused its discretion in abstaining under *Younger* where a claim of federal preemption was presented. Similarly, in *Baggett v. Dept. of Professional Regulation*, 717 F.2d 521 (11th Cir. 1983), the Eleventh Circuit rejected the application of *Younger* abstention where a

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Council has no right to attempt to establish "a coherent policy" which is contrary to federal law. Further, neither the Council, nor Louisiana courts, has a "superior competence" to determine the federal law issues presented by NOPSI.

preemption claim is readily apparent and involves a state agency acting beyond its lawful limits of authority. In such cases, the court noted "abstention can serve no principle of comity or of 'our federalism.'" *Id.* at 524 (citing *Empire Inc. v. Ashcroft*, 524 F.Supp. 898 (W.D. Mo. 1981)).

Younger typically applies when a party who asserted a constitutional defense in a state-initiated enforcement proceeding before a state court or agency also seeks to have a federal court enjoin the state proceeding on the same basis. The doctrine of "our federalism" is premised on the principle that, in light of the Fourteenth Amendment, constitutional guarantees are just as applicable to states, and state courts are therefore competent to interpret and enforce them. *Younger* should not be applied to federal proceedings in which a party has sought enforcement of rights arising from an order of a federal regulatory agency on the basis of federal preemption.

C. The Decision Below Ignores Petitioner's Allegations Under 16 U.S.C. § 825p.

Parts I and II of the Fifth Circuit's initial decision discuss the applicability of 16 U.S.C. § 825p,[10] "a provision [of the Federal Power Act] which serves to reinforce the general jurisdiction provisions governing federal district courts." *New Orleans Public Service Inc. v. City of New Orleans*, 782 F.2d 1236, 1239 (5th Cir. 1986) (Citation omitted). The court's initial decision failed to determine the applicability of this provision: "We need not and do not decide, however, whether the

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[10] Section 825p provides in relevant part:

The District Courts of the United States, and the United States Courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder.

federal court had jurisdiction of this matter under § 825p, for federal jurisdiction over NOPSI's statutorily-based preemption claim can be sustained under a different jurisdictional grant: 28 U.S.C. § 1331." *Id.* at 1240.

In light of the Fifth Circuit's revised holding, resolution of this question is essential. If jurisdiction is proper pursuant to 16 U.S.C. § 825p, which grants federal courts *exclusive* jurisdiction over actions brought to "enforce any liability *or duty* created by . . . any rule, regulation or order" promulgated pursuant to the Federal Power Act, federal court abstention is obviously improper. And, as the Fifth Circuit noted:

> at least one Circuit has held that § 825p does not require an undisputed violation of a clear FERC opinion before jurisdiction may be assumed by the district court. Rather, parties may heatedly dispute *the effect and interpretation* to be given a FERC opinion and still obtain federal jurisdiction under § 825p. *State of California v. Oroville-Wyandotte Irrigation District*, 411 F.Supp. 361 (E.D. Ca. 1975), *aff'd* 536 F.2d 304 (9th Cir.), *cert. denied*, 429 U.S. 922 (1976) (finding jurisdiction under 16 U.S.C. § 825p even where there was a conflict in the way different agencies interpreted the effect of decisions by the FPC [precursor to FERC] and the California Public Utilities Commission, and concluding ultimately that the two decisions did not conflict).

782 F.2d at 1240 n.4 (emphasis supplied). Additionally, in light of this Court's decision in *Nantahala*, the district court's conclusion that FERC Opinion No. 234 imposed no duty on respondents, as local regulators, to recognize the FERC-allocated costs associated with Grand Gulf 1 as a legitimate operating expense of NOPSI must be rejected.

In *Nantahala*, this Court held that the filed-rate doctrine of *Montana-Dakota Utilities Co. v. Northwestern*

Public Service Co., 341 U.S. 246, 251-52 (1951), requires local utility regulators to allow, "as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price." *Nantahala*, —— U.S. at ——, 106 S.Ct. at 2356. "Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable." U.S. at ——, 106 S.Ct. at 2357.[11] Further, where, in addition to setting rates, the FERC makes an allocation of costs, local regulators cannot ignore that allocation by arguing that the utility should have obtained less expensive electricity than was allocated by the FERC. —— U.S. at ——, 106 S.Ct. at 2360. Respondents have refused to acknowledge that NOPSI's FERC-allocated costs must be recognized as a legitimate operating expense. As NOPSI's claims are premised on the duty imposed on respondents resulting from the effect of FERC Opinion No. 234, exclusive federal jurisdiction exists pursuant to 16 U.S.C. § 825p, thereby prohibiting the exercise of federal court abstention.

CONCLUSION

The abstention doctrines are particularly inappropriate where a plaintiff has presented a substantial federal preemption claim and no legitimate state interest is involved. Abstention should not be permitted to become a vehicle by which federal courts can abdicate their responsibility to enforce this Court's holding in *Nantahala*. Because Opinion No. 234 through the filed rate doctrine imposes a duty upon respondents to recognize the FERC-allocated costs, exclusive jurisdiction exists pursuant to 16 U.S.C. § 825p. For these reasons, abstention is improper. Ac-

[11] While *Nantahala* also holds that an increase in FERC-approved wholesale rates need not lead to an increase in retail rates, "such a divergence between wholesale and retail rates would occur only if costs *other than* those resulting from the purchase of FERC-regulated power or gas were to decrease." *Nantahala*, —— U.S. at ——, 106 S.Ct. at 2349 (emphasis by the Court).

cordingly, SERI respectfully submits that certiorari should be granted to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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